

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

PHAN HUE,	:	
	:	
Plaintiff,	:	Civil No. 01-CV-1064
	:	
v.	:	(Judge Yvette Kane)
	:	
JAMES UPDIKE, et al.,	:	(Magistrate Judge, J. Andrew Smyser)
	:	
Defendants.	:	Filed Via Electronic Case Filing

**MOTION FOR LEAVE TO FILE ADDITIONAL MOTION FOR  
SUMMARY JUDGEMENT BASED ON FACTS DISCLOSED IN  
DISCOVERY**

1. Phan Hue filed his Civil Rights Complaint on June 15, 2001. (Doc.1).
2. A Summons was issued as to the Defendants on December 17, 2001. (Doc.10).
3. Corrections Defendants entered their Appearance on January 24, 2002. (Doc.12).
4. Corrections Defendants filed a Motion to Dismiss on February 8, 2002, with their Brief in Support of Motion to Dismiss. (Doc. 14 and 15).

5. A Case Management Order was entered on March 6, 2002. (Doc. 20). This called for all dispositive motions to be filed by October 7, 2002.
6. On April 15, 2002, the Magistrate Judge issued his Report and Recommendation as to Corrections Defendants' Motion to Dismiss. (Doc. 31).
7. On May 10, 2002, this Court entered an order denying Corrections Defendants Motion to Dismiss. (Doc. 35).
8. Corrections Defendants filed their Answer to Plaintiff's Complaint on May 15, 2002. (Doc. 36).
9. On May 30, 2002, Corrections Defendants filed a Motion for Summary Judgment, and Brief in support thereof, based on exhaustion, only. (Doc. 42 & 45).
10. The Court entered an Order in response to Plaintiff's request to stay proceedings pending the appearance of counsel, granting the relief requested in part and denying it in part. The Court stayed Plaintiff's need to respond to Defendants Motion for Summary Judgment for 60 days and gave the Pro Bono Chairman of the Federal Bar Assoc. until July 12, 2002, to find counsel for the Plaintiff. (Doc. 48).
11. Plaintiff filed his Brief in Opposition to Defendants Motion for Summary Judgment on June 18, 2002. (Doc. 51).

12. On July 19, 2002, Plaintiff filed a Motion to Compel Defendants to produce probative material and essential documents for Discovery. (Doc. 55).
13. On September 9, 2002, This Court stayed all proceedings until November 1, 2002. (Doc. 63).
14. On November 14, 2002, this Court extended the stay of the proceedings until December 31, 2002. (Doc. 64).
15. An Order was entered on December 6, 2002, directing that the Defendants provide medical records to the Federal Bar Association Pro Bono Chair for review at the request of the Court. (Doc. 68).
16. A confidential agreement relating to the medical records was filed on December 27, 2002. (Doc. 69).
17. On January 16, 2003, the Court again stayed the proceedings until March 17, 2003. (Doc. 70).
18. On March 20, 2003, the Court continued the stay of proceedings until April 8, 2003. (Doc. 74).
19. On April 2, 2003, the Court lifted the stay and directed the Corrections Defendants to file a Reply Brief to Plaintiff's Brief in Opposition to the Motion for Summary Judgment and directed the Plaintiff to file a brief in support of his Motion to Compel. (Doc. 75).

20. The Court issued its initial stay of proceedings shortly after Discovery, September 9, 2002, but prior to the original deadline for filing of Dispositive Motions, October 7, 2002.
21. Corrections Defendants filed their initial Motion for Summary Judgment based on the defense of exhaustion only, which was possible without further Discovery. This Motion for Summary Judgment was filed only days after the Corrections Defendants filed their Answer to Plaintiff's Complaint. (Doc. 36, 42).
22. The Corrections Defendants are now desirous of filing a Motion for Summary Judgment on the facts brought out in Discovery. The new Motion for Summary Judgment is in addition to and not in lieu of the Motion for Summary Judgment already filed.
23. The Motion for Summary Judgment on the Facts is not repetitive of the initial Motion for Summary Judgment.
24. The Corrections Defendants have not waited until now to develop this Motion but prepared it for filing as soon as Discovery was completed in 2002. It was not filed earlier as the proceedings were repeatedly stayed while seeking counsel for the Plaintiff.
25. The Corrections Defendants have waited until now to file its Motion for Summary Judgment on the Facts, only due to the stay of proceedings.

26. No prejudice results in the filing of this Motion at this time, as it is now clear that the Plaintiff will not have counsel appointed and that Plaintiff, himself, must file any response. Plaintiff will still have an opportunity to respond.
27. In addition, the filing of said Motion for Summary Judgment on the Facts results in the efficient use of judicial resources and does not further delay the trial process as no new trial date has been established.

WHEREFORE, the Corrections Defendants pray this Honorable Court grant them permission to file the Motion for Summary Judgment on the Facts supplementing its Motion for Summary Judgment due to exhaustion.

Respectfully Submitted,

Office of General Counsel

BY: s/Marsha Mills Davis

Marsha M. Davis

Assistant Counsel

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Pennsylvania Department of Corrections

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Dated: April 11, 2003

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JAMES UPDIKE, et al.,	:	(Magistrate Judge, J. Andrew Smyser)
	:	
Defendants.	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I am this day depositing in the U.S. mail a true and correct copy of Corrections Defendants' Motion to File Additional Motion for Summary Judgment Based on Facts Disclosed in Discovery in the above-referenced matter.

Service by first-class mail  
addressed as follows:

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s/ Marilyn Wright  
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Dated: April 11, 2003